

BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION  
DIVISION OF SPECIAL EDUCATION

IN THE MATTER OF:

*V.C., the Student, and  
C.T., the Student's Mother,  
Petitioners,*

DOCKET NO: 07.03-100097J

v.

MEMPHIS CITY SCHOOLS,  
*Respondent.*

**FINAL ORDER**

This matter was heard in Memphis, Tennessee on March 2-4, 2009, before Leonard Pogue, Administrative Law Judge, assigned by the Secretary of State, Administrative Procedures Division pursuant to T.C.A. § 49-10-606 and Rule 520-1-9-.18, Rules of State Board of Education. Attorney Timothy W. Smith represented the Respondent Memphis City Schools (MCS). Petitioner V.C. was not present for the hearing, but V.C.'s mother, C.T., was present and Petitioners were represented by attorneys Craig P. Barnes and Christina A. Zawisza.

The subject of this proceeding, in general terms, is whether Respondent has provided procedural due process to the Petitioners and whether a free appropriate public education (FAPE) was provided to V.C. The specific issues are centered on Respondent's discontinuance of V.C.'s at home Applied Behavioral Analysis (ABA) program and Extended Day program.

After consideration of the entire record, testimony of witnesses, and the arguments of the parties, it is **DETERMINED** that Respondent is in compliance with the

Individuals with Disabilities Act (IDEA) procedures and providing V.C. FAPE. This determination is based upon the following Findings of Fact and Conclusions of Law.

### **FINDINGS OF FACT**

#### **Background**

1. V.C., a 7-year old student at the time of this hearing, was diagnosed with autism in 2004. V.C. began speech therapy, occupational therapy, and ABA services when he enrolled at Harwood School for developmental disability through the Tennessee Early Intervention Program in 2003. V.C. received at home ABA services beginning in 2004. Additionally, he has received Extended Day services after school for socialization. As a result of the February 2008 Individualized Education Plan (IEP) meeting, the at home ABA program (10 hours) was terminated effective July 2008 and the Extended Day services (6 hours) were terminated in May 2008. C.T. has continued to pay for at home ABA services and for services to address V.C.'s socialization skills.
2. For the 2008-2009 school year, V.C. has attended Shady Grove Elementary School pursuant to the February 2008 IEP. His current educational plan provides for a CDC (special education class) classroom placement with intensive small group and one-on-one instruction, daily integration in a "mainstreamed" kindergarten setting with typical peers with one-on-one support from a Behavior Technician, socialization with typical peers during lunch and recess, and speech therapy (both individually and in a group setting).
3. C.T. filed an Administrative Complaint in June 2008 with the Tennessee Department of Education, Division of Special Education as a result of her disapproval of the 2008 IEP Team recommendations. The Department of Education ruled that

Petitioners' complaints had no basis in fact and that the Respondent had complied in all aspects with the IDEA and applicable law.

4. Petitioners now allege that Respondent violated the procedural requirements of IDEA and deprived V.C. of FAPE by: (1) providing V.C.'s ABA program and the Extended Day program, effectively "off the books"; (2) failing to properly supervise and maintain V.C.'s at home ABA program, and then terminating both the ABA program and Extended Day program, without any basis in relevant performance based data, assessments or any other scientific data; and (3) predetermining that V.C.'s at home ABA and Extended Day programs would be discontinued without any meaningful participation by C.T. As a result of these procedural and substantive violations of IDEA, Petitioners allege they have suffered harm, and are entitled to, among other things, compensation for expenses incurred in maintaining the ABA at home program and Extended Day program from August 2008 to the present, funding from Respondent to continue both programs at least throughout V.C.'s 2009-2010 IEP, as well as attorney's fees and costs.

#### **BEST Team**

5. V.C.'s education is overseen by the Respondent's Behavior and Educational Support Training Team (BEST team) which is a specialized team of professionals trained in ABA methodologies and the education of children with autism spectrum disorders. Dr. Kathleen Cooter, who was offered by the Petitioners as an expert in Special Education and ABA, testified that it would be a "best practices" approach to have a select group of professionals assigned to an autism team.

6. The BEST team is comprised of Carolyn Moore, Rebecca Fik, Catherine Ryan, and Rahja Jones and other personnel who meet weekly to review the educational progress

of the children who are under the BEST team's supervision. The BEST team provides support and training of school personnel from the MCS and other school systems across West Tennessee in partnership with TRIAD (a program which educates teachers across the State of Tennessee in how to utilize ABA methodologies to work with children with autism).

7. Kay Flowers is a Legal Services Consultant with the State of Tennessee, Department of Education, Division of Special Education and has extensive experience working with children with autism spectrum disorders. Ms. Flowers is familiar with ABA methodology and the BEST team. Ms. Flowers testified that the MCS BEST team was one of the forerunners in the utilization of ABA methodologies in the education of children with autism and behavioral difficulties, and that a BEST team that meets every week to review a small number of children represents "best practices" for the education of an autistic child.

8. Rebecca Fik is the program supervisor assigned to V.C.'s IEP Team. Ms. Fik has thirty-four years of experience in special education with twenty-eight years of experience teaching children with autism. Ms. Fik has training and experience in discrete trials, incidental teaching, and in all aspects of ABA. Ms. Fik is very knowledgeable regarding V.C.'s educational needs and his disability and has been working with him since he was three years old. Ms. Fik testified that she has hand picked V.C.'s teachers and thinks Mr. Jones is the best technician in the MCS.

9. Catherine Ryan is the BEST team teacher consultant assigned to V.C.'s school team. Ms. Ryan is a behavior consultant with the BEST team and has received training and education in ABA and the management of behaviors in children with autism

spectrum disorders through the utilization of ABA methodologies; she is not a Board Certified Behavior Analyst. Dr. Cooter testified that that Ms. Ryan is highly qualified in the ABA methodology. In 2007-2008 Ms. Ryan was involved in the supervision and management of V.C.'s ABA home program.

10. Lori Norton is V.C.'s current CDC classroom teacher and is primarily responsible for his academic progress in the school setting. Ms. Norton has education, training and experience in ABA methodologies and the utilization of ABA in the education of children with autism spectrum disorders. Rahja Jones is V.C.'s Behavior Technician. Mr. Jones has training with ABA methodologies and has been trained by TRIAD. Mr. Jones is V.C.'s one-on-one ABA behavior specialist who works with him everyday and has worked with V.C. for the last four years.

11. According to Ms. Ryan, each member has an average caseload of approximately 15 students and the five member team discusses each and every case for a total of about 60 students. Ms. Ryan testified that she met weekly with the BEST team to review V.C.'s educational program and also discussed the home program with Ms. Robyn Anthony who was V.C.'s classroom teacher during the 2007-2008 school year and a member of the IEP team. Ms. Ryan attended the February 2008 IEP meeting and reported to the IEP team regarding V.C.'s ABA home program. Dr. Cooter testified that the BEST team is not mandated by IDEA and is different than the mandated IEP team.

#### **Home ABA Program/ Extended Day Program**

12. The home ABA program and the Extended Day program are not contained on V.C.'s 2006-2007 or 2007-2008 IEP. According to Ms. Fik, these programs were not listed on V.C.'s IEPs because "that was above and beyond what was required by the

IEP." Ms. Fik testified that the IEP team decided to provide more than the law requires and the IEP document only contains the services that the IEP team concludes is necessary to provide FAPE. Ms. Flowers testified that the IEP document determines the services that the school system has agreed to provide and a school system can agree to provide an additional service in excess of FAPE. According to Ms. Flowers, if an additional service is not listed on the IEP as a related service, then it is not part of the child's IEP.

13. Nika Hafford was V.C.'s at home ABA therapist and continues in that role today. Ms. Hafford did not attend IEP meetings. Since MCS ended its involvement in the home program, Ms. Hafford has not maintained any data on the program.

14. Brandon McCord testified on behalf of Petitioners regarding the field of behavioral analysis. He observed V.C. twice at home (November 2008) and observed him on one occasion in the school setting (December 2008) in preparation of his report. Mr. McCord testified that V.C. received one-on-one instruction in the CDC class and that he witnessed the highest level of off-task disruptive behavior by V.C. in the CDC class. According to Mr. McCord, V.C. displayed a lack of total instructional engagement in the regular classroom and he observed V.C. sitting with his back to the teacher gazing off into another direction for nearly all of the regular classroom instruction period. Raja Jones testified that on the day of Mr. McCord's visit that there were other people in the rear of the classroom that distracted V.C. and the other children and it is incorrect to suggest V.C. cannot be successful in the regular classroom. In the inclusion classroom, Mr. McCord observed that occasionally a one to one assistant would whisper something in V.C.'s ear, but no one was really involved as far as instructing V.C. In the art classroom, the assistant was very active, prompting him to complete his tasks.

15. Mr. McCord testified that the total instructional engagement time in V.C.'s at home ABA program and the CDC class is similar because he gets one-to-one instruction in both settings. In Mr. McCord's opinion, based on his observations of V.C. at school and at home, V.C. would continue to benefit from one-to-one instruction and the at home ABA instruction provided by Nika Hafford achieved more with less disruptions. In Mr. McCord's opinion, V.C. is not ready to participate in group instruction in a regular education class based on his lack of instructional engagement in that class, and he does not think V.C. is receiving an educational benefit from his participation in the regular education class.

16. Mr. McCord acknowledged that he is not an expert in the different goals and objectives and/or teaching modalities for a child like V.C. and is not an expert in the determination or evaluations of a child's present levels of performance. He also is not an expert in the development of an IEP nor does he have any expertise in the education of a child with autism. Mr. McCord testified that he is not qualified to testify as to whether the home program is a necessary component of V.C.'s IEP in order for the child to be provided FAPE. Mr. McCord admitted that he is not an educational expert and that he is not qualified to offer any opinions regarding the educational differences of the different settings, such as home, art class, or CDC class. Mr. McCord confirmed that his methodology was based on collecting multiple data and that he did not do that in this case but still believes that he spent sufficient time observing V.C.'s behaviors at school to formulate his opinions.

17. Dr. David Bicard testified on behalf of Petitioners on the subject of applied behavioral analysis. Dr. Bicard testified regarding the importance of data collection and

analysis in an ABA program. Dr. Bicard was not familiar with V.C.'s education and had no opinion as to whether or not an ABA home program was appropriate for V.C. Dr. Bicard noted that an ABA home program is not needed if the child has a sufficiently challenging IEP and is making appropriate progress in school.

18. Both Dr. Cooter and Dr. Bicard testified that the best program is one where a child's educational services are received during the school day as opposed to services at home. Dr. Cooter had no opinion regarding whether or not the at home program is required in order for V.C. to receive FAPE. Dr. Cooter had no opinion regarding whether or not the home program is successful or not and could not say whether or not V.C. fits into the type of child for whom a home program would be a good option to consider. Dr. Cooter had no opinion regarding the Extended Day socialization program.

19. Dr. Cooter testified that ABA is an appropriate intervention for a child of V.C.'s age, that there is no research that suggests that ABA is only meant for a certain age range, and the method is even used with older adults. Dr. Cooter further testified that V.C.'s mean length of utterance and vocalization increased when he was with Ms. Hafford in therapy, which indicated to her that he is getting educational benefit from the home program.

#### **Communication, Supervision, and Data**

20. C.T. and Ms. Hafford testified that there was a daily communication log that went back and forth between the school and home. According to Ms. Ryan, the log or notebook contained a communication section for Ms. Hafford and Ms. Ryan to exchange comments, and a section that contained data sheets. At the end of the school year, the notebook is returned to the parent. This notebook was apparently not available at the time



of the hearing although there were copies of some of the information contained in the notebook.

21. Ms. Ryan testified that she provided instruction and support to Ms. Hafford including data sheets, lessons plans, and training materials. Ms. Hafford testified that nearly everything that she did at home with V.C. was based on instructions from MCS. Ms. Ryan visited the home to meet with Ms. Hafford 8 separate times during the 2007-2008 school year, six times in 2007 between October and December, once in March 2008, and once in April 2008. Dr. Cooter testified that minimal supervision of the home program should have been occurring every six weeks.

22. Dr. Cooter testified that the data that Ms. Ryan maintained, from the time she began her visits up until the date of the IEP meeting, was the appropriate data that she should have been maintaining, that the drill sheets that were provided to the home program by MCS were very good, and that contact logs and communication logs were "good stuff" documenting progress from September of 2007 through April of 2008.

#### IEP Meetings

23. C.T. testified that during the 2007 IEP meeting, Ms. Fik told her that V.C. would no longer receive the at home ABA services once he reached school age. Ms. Fik testified that she didn't recall ever talking to C.T. about ending V.C.'s at home ABA, but that she tells all her parents that the goal is to get children in a naturalistic teaching environment. She further noted that she had never made a decision for V.C. based on his age.

24. C.T. testified that at the February 2008 IEP meeting, it was decided that V.C.'s at home ABA program would end, and that the Extended Day program would be discontinued. C.T. is a member of the IEP team, and she refused to sign the 2008 IEP

because she disagreed with the proposed decision to eliminate both programs. C.T. testified that the recommendations to end the at home ABA services and the Extended Day program were both made by Ms. Fik. Those present at the meeting included Robyn Anthony (teacher), Bobbi Musgrove (speech), Angela Brandon (occupational therapist), Ms. Ryan, Ms. Fik and C.T. Ms. Ryan was the minute taker at the meeting but did not take notes of when she was talking.

25. Ms. Ryan did not provide any data, notes, or log books from the ABA at home program to the members of the 2008 IEP team. Ms. Ryan orally reported at the IEP meeting regarding V.C.'s ABA at home program and Extended Day program. Ms. Ryan discussed the progress made in the at home program and the goals of the program. Dr. Cooter testified that the person who monitors the at home program should report to the IEP team.

26. According to C.T., there was back and forth between C.T. and Ms. Fik about whether or not V.C. needed a home ABA program. Ms. Ryan testified that "everybody came together to make a decision on the things that were decided" at the February 2008 IEP team meeting, except V.C. V.C. confirmed that if the IEP team had reviewed all of the data before the IEP team meeting that they would have had a good understanding of the home program. Ms. Fik testified that all at home programs are discussed at weekly BEST team meetings.

27. The IEP team first developed the goals and objectives for V.C. and then identified the appropriate setting to teach those goals and objectives. The at home ABA was discontinued because it was not felt that V.C. needed to be taught in that fashion any longer to achieve success in the regular education program or in the special education

program. The IEP team (except C.T.) concluded that the classroom was the appropriate setting because V.C. had begun to generalize his skills and he needed to be taught in a naturalistic environment that was least restrictive. Dr. Cooter testified that the reason that the IEP team gave for discontinuing the ABA home program was rational but not data informed.

28. In response to the Administrative Complaint, Ms. Fik and Ms. Moore wrote letters, with Ms. Moore stating, in part, that "as children reach school-age, they are typically placed in more structured settings for learning activities." Ms. Flowers reviewed the correspondence from Ms. Fik and testified that the correspondence outlines appropriate reasons why the at home program was discontinued based, in part, on the goals and objectives on V.C.'s IEP and where those goals and objectives can best be addressed. Ms. Flowers reviewed V.C.'s 2007-2008 IEP and 2008-2009 IEP. Ms. Flowers testified that both IEPs complied with state law, that there were no procedural violations, and the IEPs offered the child a free and appropriate public education.

29. Dr. Cooter testified that, pursuant to the minutes of the 2008 IEP, MCS did not review and/or rely on any substantive data prior to the removal of V.C.'s at home ABA services and that the decision to remove the at home ABA denied V.C. an educational benefit causing him harm. In Dr. Cooter's opinion it was clear that there had been a predetermination that V.C. was not going to receive any more at home ABA therapy at the 2008 IEP team meeting. Dr. Cooter described the removal of V.C.'s at home services as a substantive placement change and that V.C.'s at home ABA program is a related service.

30. Dr. Cooter identified the following procedural violations: (1) the in home therapy was not given substance in the IEP meeting, there was no one assigned to monitor it, there was no continuous monitoring, there was a lack of data on the in home program at the IEP team meeting; (2) C.T.'s voice was not given credence in the IEP meeting. According to Dr. Cooter, the procedural violations led to substantive and educational harm to V.C. and denied him FAPE. Specifically, Dr. Cooter testified that V.C.'s educational program was not viewed in total, only the pieces of it brought to the attention of the IEP team were considered. Dr. Cooter testified that the lack of data seen by the IEP team caused V.C. educational harm.

31. In regard to data, Dr. Cooter testified that there was little translation of data between home and school resulting in two very separate silos of education for V.C. As a result there was no generalization and educational harm to V.C. In reviewing the records of MCS, Dr. Cooter opined that in 2007 only about 50% of the information collected could actually be defined as data. Dr. Cooter defined MCS's data keeping as increasingly anecdotal, which serves a place, but is only part of a total look at data and data-based instruction.

32. Dr. Cooter identified the assessment tools used by MCS in the 2008 IEP meeting as follows: the Brigance test, a prevocational checklist, a preschool language scale that is used for speech therapy, and teacher observations. She opined that MCS' use of the Brigance, although a measure of IEP growth, was not an adequate assessment for the decision to remove the home ABA. Dr. Cooter acknowledged that the tests used by MCS were tests recommended by the State of Tennessee. Ms. Flowers testified that the IEP team relied on the Brigance test, the nonspeech test of expressive language, the receptive

one-word vocabulary test, the Developmental Assessment of Young Children (DAYC), a prevocational checklist, and teacher observations. Ms. Flowers confirmed that the IEP team's evaluations are acceptable. Ms. Ryan testified that children with autism are not given the normed Brigance test.

33. Dr. Cooter prepared an initial report containing her opinions, which was later amended after she had reviewed additional documents and numerous witness depositions. Dr. Cooter testified that the two reports differ but not in a substantial way. She also testified that she didn't have all the records needed for the first report and did not do an adequate a job of preparation for the first report. In the time between the two reports, Dr. Cooter learned that some of the information provided in her interviews of Ms. Hafford and C.T. was not accurate (either because of misunderstanding or misstatements). However, Dr. Cooter testified that little weight was given to her interview of C.T. and Ms. Hafford and that her amended report was data driven. By her own admission, the two reports differ little and the first report was prepared without all the records needed and not as adequately as she should have, which calls into question her conclusions and makes it difficult to give the same weight to her testimony as to all of the other witnesses.

#### **Educational Progress of V.C.**

34. C.T. testified that V.C. has made meaningful educational progress through the years. C.T. is provided progress reports every six weeks that are four or five page breakdowns of every one of the IEP goals and his progress which documents that V.C. is making progress towards his IEP goals. C.T. believes that V.C. has made a lot of progress, increased his verbalization, and mastered a lot of new skills over the last two years. Dr. Cooter confirmed that V.C.'s progress reports and IEPs from year to year

demonstrate that V.C. has made meaningful educational progress. For 2008-2009 up to the date of the hearing, the progress reports confirm that the child has made meaningful educational progress. Mr. McCord testified that V.C. has made significant progress in his academic goals and objectives.

35. Without considering the home program, Dr. Cooter testified that the school records, documentation, progress reports and IEP goals confirm that V.C. has had an appropriate public education over the last couple of years. She deemed his educational program a success and that there is much data that proves that the school is making progress with V.C. Dr. Cooter testified that there is no data to show that the child has regressed in any way, that the child has lost any skill or that the child has suffered any harm at all since Respondent ended its involvement in the at home program.

36. Ms. Norton testified that V.C. has made appropriate progress toward his academic goals which are documented on his IEP progress reports and that he has made almost equivalent progress to a typical kindergarten student. For example, V.C. knows all of his letters, the sounds for almost all of the letters, he knows 50 sight words as compared to the goal for a typical kindergarten child of 17 sight words, can identify coins, knows his colors, can tell time to the hour, and knows his personal information such as address, phone number, age, first and last name, etc. V.C. has progressed in the reading program, working through over 98 different lesson plans and goals and has made meaningful progress with the math program, performing math exercises at a regular kindergarten level. Ms. Norton reviewed V.C.'s progress reports and testified that for the fourth reporting period, that out of 36 defined objectives for V.C. on his IEP, he has reached the objective in 8 areas. For the third quarter reporting period, he achieved the objective in 7

out of 36 goals. Ms Norton testified that V.C. has delays that go along with his diagnosis of autism, such as socially and delays in his speech and verbal expression which may lead to frustration and aggression. He can experience problems engaging in conversations, problems initiating interactions with peers, problems answering questions, and vocabulary problems. V.C. has hit Ms. Norton more than once. Ms. Norton has V.C. in CDC class from 12:10 to 3:15 each day, and she works with him one-on-one for 45 minutes each day.

37. Mr. Jones testified that V.C. has made much progress in terms of his behavior management and socialization abilities, as well as his verbalization and spontaneous speech. Mr. Jones was not particularly familiar the at home ABA program and testified that it possibly could have contributed to V.C.'s progress.

38. Over course of the 2008-2009 school year, V.C. has made progress in socialization and generalization in the regular kindergarten class and is able to attend for longer periods of time.

### **CONCLUSIONS OF LAW**

1. The Petitioners in this case have the burden to introduce evidence that would by a preponderance of the evidence prove the issues should be resolved in Petitioners' favor. Rule 1360-4-1-.02, Uniform Rules of Procedure for Hearing Contested Cases before State Administrative agencies.

2. The IDEA provides that children with disabilities be provided FAPE. Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176 (1982). As part of providing FAPE, school districts are required to establish an individual education plan for each child with a disability. Id.

3. Under IDEA, "related services" means transportation, and such developmental, corrective, and other supportive services as may be required to assist a child with a disability to benefit from special education. Cedar Rapids Community School District v. Garret F., et al., 526 U.S. 66 (1999). Special education instruction can take place, "in the classroom, in the home, and in other settings." IDEA, 20 U.S.C. § 1401(a)(29)(a)

4. The inquiry of the courts regarding the provision of FAPE is twofold: 1) has the State complied with the procedures set forth in the Act? and, 2) is the IEP developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits. Id. at 206-207.

5. With regard to procedural matters, a court should "strictly review an IEP for procedural compliance," although technical deviations will not render an IEP invalid. Deal v. Hamilton County Board of Education, 392 F.3d 840, 853 (6<sup>th</sup> Cir. 2004) *citing* Dong ex rel. Dong v. Bd. of Educ. of the Rochester Cmty. Sch., 197 F.3d 793, 800 (6<sup>th</sup> Cir. 1999). A finding of procedural violations does not necessarily entitle Petitioners to relief. Id. The procedural violation must cause substantive harm, and thus constitute a denial of FAPE, for relief to be granted. Id. States and school districts should be afforded discretion in determining what type of program is appropriate based on the individual needs of a disabled child. McLaughlin v. Holt Public Schools Board of Education, 320 F.3d 663 (6<sup>th</sup> Cir. 2003). The burden of proof is on the parent to prove by a preponderance of the evidence that the IEP proposed by the school violates the IDEA. Id.

6. Petitioners argue that Respondent committed procedural violations by providing the ABA at home and Extended Day program "off the books." By doing this, Petitioners claim that Respondent is attempting to avoid the procedural safeguards of IDEA when



taking away the at home ABA and Extended Day program. Neither program was listed on V.C.'s IEP and Respondent considered the programs above and beyond what was required by the IEP. However, there was no proof that Respondent arbitrarily ended either program. The reasons for ending the services, as noted by Dr. Cooter, were rational. Nonetheless, Respondent should not be permitted to do an "end run" of procedures when the services are changed. Whether or not Respondent complied with procedural requirements when deciding to terminate the ABA at home and Extended Day programs will be examined more fully below.

7. Petitioners allege that the decision to eliminate the programs was not based on relevant data and that there is no written record of discussions of the assessment tools, methodologies or strategies regarding V.C.'s at home ABA program. Specifically, Petitioners claim that the IEP team did not rely on or review any data generated from the at home program. Dr. Cooter opined that the decision to end the ABA at home was not data informed, denied V.C. educational benefit and caused him harm. Although the IEP meeting notes do not reflect that the at home data was discussed, the proof established that Ms. Ryan did report to the team about the at home program and Extended Day program. Ms. Ryan discussed the progress made in the at home program and the goals of the program. Moreover, because of the weekly BEST team meetings, Ms. Fik was already well informed as to V.C.'s educational program. Ms. Anthony, V.C.'s classroom teacher during the 2007-2008 school year and member of the IEP team, was also well informed due to her prior discussions with Ms. Ryan about the home program. As to the assessment tools and tests, Dr. Cooter acknowledged and Ms. Flowers confirmed that the tests used by Respondent were tests approved by the State of Tennessee. Dr. Cooter

further added that MCS' use of the Brigance test, although a measure of IEP growth, was not an adequate assessment for the decision to remove the home ABA. However, the proof established that the Brigance was not the sole or primary basis for the decision to discontinue the at home ABA as suggested by Dr. Cooter. The argument that the decision was not based on data is without merit.

8. It is contended by Petitioners that MCS failed to properly supervise and maintain the at home ABA program. Dr. Cooter opined that Ms. Ryan was knowledgeable about the in home program but not informed. Ms. Ryan visited the home to meet with Ms. Hafford 8 separate times during the 2007-2008 school year. Petitioners characterize the visits as observations where data was not collected, yet Dr. Cooter testified that the data that Ms. Ryan maintained, from the time she began her visits up until the date of the IEP meeting, was the appropriate data that she should have been maintaining. Both C.T. and Ms. Hafford testified that there was a daily communication log that went back and forth between the school and home. The log/notebook contained a communication section for Ms. Hafford and Ms. Ryan to exchange comments and a section that contained data sheets. Ms. Ryan provided instruction and support to Ms. Hafford including data sheets, lessons plans, and training materials. Dr. Cooter noted that the drill sheets that were provided to the home program by MCS were very good, as were the contact logs and communication logs. Petitioners' claim that Respondent violated procedural requirements by failing to properly supervise and maintain the at home program is contrary to the proof.

9. The IDEA requires "an opportunity for the parents of a child with a disability ... to participate in meetings with respect to the identification, evaluation, and educational

placement of the child, and the provision of a free and appropriate public education to such child....” 20 U.S.C. §1415(b)(1). Parental participation in IEP meetings is to be more than mere form, it must be meaningful. Deal v. Hamilton County Board of Education, 392 F.3d 840, 858 (6<sup>th</sup> Cir. 2004). A predetermination by a school system, before the IEP, concerning a placement decision is a procedural violation of the IDEA. Id. at 857. A placement decision may only be considered to have been based on the child’s IEP when the child’s individual characteristics, including demonstrated response to particular types of educational programs, are taken into account. Id. at 859. In this case, Petitioners argue that predetermination occurred based, in part, on the fact that C.T.’s request that the programs continue was not heeded. Even though C.T. and the IEP team disagreed, this does not mean that C.T.’s opinion wasn’t given credence, as opined by Dr. Cooter. In fact, Ms. Fik testified that the IEP team considered what C.T. said in the meeting. Petitioners also rely on letters written by Ms. Moore and Ms. Fik, months after the IEP meeting and in response to the Administrative Complaint, to prove predetermination. The only suggestion of predetermination in either letter is a statement by Ms. Moore, who was not present at the IEP meeting, that as children reach school age they are typically placed in more structured settings. MCS representatives testified that the program discontinuance was not an age based decision. This statement in a letter alone is not proof of predetermination. The IEP team developed the goals and objectives for V.C. and then identified the appropriate setting to teach those goals and objectives. Ms. Ryan reported to the IEP team about the at home program, assessment tools were reviewed, and there was discussion back and forth between C.T. and Ms. Fik about whether or not V.C. needed an at home ABA program. The IEP team concluded (except

C.T.) that the classroom was the appropriate setting because V.C. had begun to generalize his skills and he needed to be taught in an environment that was least restrictive. The at home ABA was discontinued because it was not felt that V.C. needed to be taught in that fashion any longer to achieve success in the regular education program or in the special education program. The evidence reveals that there was no predetermination by the Respondent and that C.T. meaningfully participated in the IEP process. Further, there is evidence to support a finding that the individual needs of V.C. were considered as part of the decision to terminate the at home ABA and Extended Day programs.

10. V.C. has made meaningful educational, behavioral and socialization progress. All the witnesses were in agreement on this point. There was no evidence presented to determine what role the continued at home ABA may play in V.C.'s success. Likewise, there is no data to show that the child has regressed in any way, that the child has lost any skill or that the child has suffered any harm since the Respondent ended its involvement in the at home program. Mr. McCord offered criticism of the school program and opined that V.C. would continue to benefit from one-to-one instruction and the at home ABA instruction. However, his opinions are based on just one observation at school that Mr. Jones indicated was not typical behavior for V.C. and Mr. McCord is not an educational expert. Given Mr. McCord's limited data and his limited expertise, little weight is given his testimony. Further, the mere fact that there is some benefit does not mean that a service is necessary.

It is **Determined** that Respondent is in compliance with IDEA procedures, has not committed any procedural or substantive violations of IDEA, and Respondent is providing V.C. FAPE. It is **ORDERED** that the remedies and relief sought by Petitioners are denied. Respondent is the prevailing party in this matter.

Entered this 21<sup>st</sup> day of May, 2009.



LEONARD POGUE  
ADMINISTRATIVE JUDGE

Filed in the Administrative Procedures Division, Office of the Secretary of State,  
this 21<sup>st</sup> day of May, 2009.



Thomas G. Stovall, Director *aeb*  
Administrative Procedures Division

Notice

Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee or the Chancery Court in the county in which the petitioner resides or may seek review in the United States District Court for the district in which the school system is located. Such appeal or review must be sought within sixty (60) days of the date of the entry of a Final Order. In appropriate cases, the reviewing court may order that this Final Order be stayed pending further hearing in the cause.

If a determination of a hearing officer is not fully complied with or implemented, the aggrieved party may enforce it by a proceeding in the Chancery or Circuit Court, under provisions of Section 49-10-601 of the Tennessee Code Annotated.